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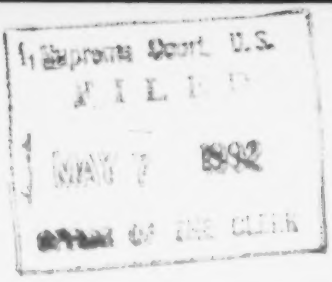


NO.

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IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

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OCTOBER, 1991 TERM

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EDDIE LOUIS TAYLOR,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

---

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

# PETITION FOR WRIT OF CERTIORARI

---

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A. QUESTIONS PRESENTED FOR REVIEW

I. Are law enforcement personnel in Memphis, Shelby County, Tennessee, discriminately enforcing state and federal narcotics laws so as to violate the protections of due process and equal protection under the law pursuant to the Fifth and Fourteenth Amendments wherein seventy-five (75%) percent of the persons of the Memphis International Airport targeted for an investigatory stop by law enforcement officers are black and only five (5%) percent of all air travelers in Memphis' geographic region are black?

A. The Sixth Circuit Court of Appeals sitting En Banc erred in holding that the constitutional provisions of due process and equal protection could be vitiated by a person by consenting to a

"consensual interview" and subsequent search of the person where:

1. There was unrefuted testimony in the record that blacks were being disproportionately targeted for investigatory stops and the en banc majority failed to use strict scrutiny to review the unlawful conduct of the officers.

2. The en banc majority failed to follow their own precedent that states that unlawful conduct by law enforcement that precedes consent vitiates that consent. United States v. Kelly, 413 F.2d 261 (6th Cir. 1990.)

II. The Sixth Circuit Court of Appeals sitting en banc erred in upholding

the district court's classification of the Petitioner's search and seizure as a "consensual interview" that did not implicate Fourth Amendment rights wherein the Petitioner was followed through the Memphis International Airport and out the airport exit doors to the curb where he was forcibly moved by two law enforcement personnel off the curb and back up against a wall, where he was flanked and confined by three officers, was interrogated with incriminatory questions, and was in fact not free to leave from the outset of the stop.

III. The Sixth Circuit Court of Appeals sitting En Banc erred in upholding the District Court's vague determination that the Petitioner had consented to the search of his tote bag and the contents

therein wherein the Petitioner was unlawfully seized for Fourth Amendment purposes preceding the discovery of any contraband, no valid consent to search was even given by the Petitioner, and where no search warrant was ever procured allowing law enforcement officers to cut into the tightly wrapped packages found in the Petitioner's tote bag.

B. PARTIES TO THE PROCEEDINGS

W. Hickman Ewing, United States Attorney, and Sidney Alexander, Assistant United States Attorney, represented the United States of America before the District Court for the Western District of Tennessee, Western Division. Mr. Ewing and Mr. Alexander also represented the Government before the original three Judge panel and the En Banc hearing before the Court of Appeals for the Sixth Circuit.

At the District Court level and at all stages of appeal, Robert M. Friedman represented Defendant, Eddie Louis Taylor, as privately retained counsel. Lawrence W. White, Attorney, also represented Petitioner on appeal.

The National Association of Criminal Defense Lawyers was permitted to file and enter Amicus Curie Brief before the Court

of Appeals for the Sixth Circuit by and through Nancy Hollander, Attorney at Law and Vice President of the National Association of Criminal Defense Lawyers.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

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D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

United States v. Taylor, 917 F.2d 1402 (6th Cir. 1990). Full text of opinion located in Appendix.

E. JURISDICTIONAL STATEMENT

1. The judgment sought to be reviewed was decided and filed February 10, 1992, by the Sixth Circuit Court of Appeals sitting en banc.

2. The Petitioner anticipates no cross-petition for certiorari.

3. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

## F. CONSTITUTIONAL AND STATUTORY PROVISIONS

### AMENDMENT 4

**Unreasonable searches and seizures.**-The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### AMENDMENT 5

**Criminal actions-Provisions concerning-Due process of law and just compensation clauses.**-No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put to jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private

property be taken for public use, without just compensation.

## AMENDMENT 14 SECTION 1

**Citizenship - Due process of law - Equal protection.**-All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

21 USCS 841

§841. Prohibited acts A

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally-

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

G. STATEMENT OF THE CASE

On October 3, 1988, the Petitioner was arrested and subsequently charged with violation of Title 18, United States Code, Section 841, et. seq., Unlawful Possession of a Controlled Substance With Intent to Sell or Deliver.

A Pre-Trial Motion to Suppress Evidence was properly and timely filed by the Petitioner and, after lengthy evidentiary hearings were conducted in the District Court, said Motion was denied by Written Order Denying Motion to Suppress Evidence. (See Appendix.)

The Petitioner subsequently entered a Conditional Plea of Guilty, specifically reserving the right to appellate review concerning all search and seizure issues.

The Petitioner's written Memorandum Outlining Plea Agreement Pursuant to Rule

11(e)(2) of the Federal Rules of Criminal Procedure included a request for the Petitioner to remain free on bond, pursuant to the Federal Rules of Appellate Procedure 9(c) and Title 18 U.S.C. Section 3143. Said request was granted by the District Court, and the Court affirmatively set forth in its Order of Release of Defendant, Eddie Louis Taylor, Pending Sentence and Appeal Pursuant to Conditional Plea and Reservation of Appellate Rights by the Defendant that the Petitioner was not a danger or risk of flight, that the appeal was not for the purpose of delay, and that the appeal raised a substantial question of law or fact likely to result in reversal.

The Petitioner properly and timely filed a Notice of Appeal, briefs were properly submitted and orally argued

before the Honorable United States Court of Appeals for the Sixth Circuit on June 15, 1990. Chief Judge Merritt, Judges Keith and Jones comprised the panel on appeal. The Panel, in a 3-0 unanimous decision, reversed the trial court, and ordered the evidence suppressed in a decision filed and entered on October 25, 1990.

The United States of America, after receiving an extension of time, filed a Suggestion for Rehearing En Banc to which the Petitioner was requested to respond, which he did in a timely fashion. The en banc review sought by the United States was granted on February 15, 1991, and the original panel decision was thereby vacated.

This case was orally argued May 22, 1991, before the Sixth Circuit United

States Court of Appeals sitting en banc. The panel, comprised of 12 Judges, on February 10, 1992, filed its split decision affirming the District Court's ruling.

H. STATEMENT OF THE FACTS

On October 3, 1988, at approximately 7:00 p.m. (CST), your Petitioner, Eddie Louis Taylor, a male black, was a passenger arriving at Memphis International Airport from Miami, Florida. (T.R. 8, 343, 344, 346) The Petitioner, who was dressed in dark maroon slacks, a work shirt, and a hat, exited the plane in the "B" Concourse, Gate 19 of the airport, at which time he turned left and walked through the terminal toward the main concourse baggage area. (T.R. 8, 44, 346, 381, 382) Three (3) police officers assigned to the Memphis Police Department Drug Task Force, who had no forewarning or alert that controlled substances and/or a "drug courier" were on the flight, elected separately to pursue the Petitioner. (T.R. 9) There was no oral agreement

among the officers, nor were any words between the officers spoken to effectuate a consensus that the Petitioner was indeed a worthy suspect to surveil. (T.R. 43, 71, 213) To the best of the officers' knowledge, Mr. Taylor was the sole black person on this flight. Officer Bevel, one of the officers, testified that seventy-five (75%) percent of the citizens that the Memphis Police Department Drug Task Force pursue and stop in the Memphis International Airport are black. (T.R. 211) Sergeant Joe Eldridge, the leader of three officers in this incident, admitted to having very little or no specific training in identifying drug couriers, and had been assigned to this task force for only six (6) months at the time of Mr. Taylor's arrest. Sergeant Eldridge first began pursuit of the Petitioner

immediately as he exited the gate area. (T.R. 7, 8, 34, 40)

The Petitioner testified that he was carrying a tote bag, walking at a somewhat brisk pace, and was totally unaware that anyone was surveiling and/or pursuing him. Officer Eldridge testified that it was not at all unusual for citizens to walk at a fast pace through the Memphis airport. (T.R. 47-48) After the Petitioner had exited the main terminal building, and walked outside to the edge of the curb of the street across which was the airport parking facility, he was encircled and contained by the three (3) police officers who had followed him through the airport terminal. (T.R. 347, 349) Sergeant Joseph Eldridge first approached the Petitioner as he was stepping from the curb, by physically grabbing and/or

forcing the Petitioner back from the street curb, causing the Petitioner to back up approximately six to eight feet until he was physically against the airport terminal building and exterior wall. (T.R. at 138, 322) Sergeant Eldridge then shoved his police badge into the Petitioner's face, thereby making his service revolver clearly visible, and ordered the Petitioner to stop because he "wanted to talk with him." (T.R. 16, 349, 350, 354) Seconds later, Officers Bonnie Bevel and Forest Roberts arrived on the scene. Officer Bevel closely flanked the Petitioner and Officer Roberts quickly assumed an encircling and containment position across the street, intentionally positioning himself between the Petitioner, the other two officers, and the airport public parking lot, where the

Petitioner's private automobile was located and the direction in which the Petitioner was attempting to and would have to travel to leave the airport facility. (T.R. 138, 322, 357) Officer Bevel then interrogated and examined the Petitioner with a litany of potentially incriminating questions. (T.R. 239-244, 355, 358, 359)

The Petitioner was instructed by Sergeant Eldridge to produce personal identification and his plane ticket for the officers to inspect, and he complied. Both the airline ticket and the Petitioner's driver's license, which were taken from him by the officers, matched the description of the Petitioner, and each contained his true name, Eddie Louis Taylor, on them. Further, his driver's license contained the Petitioner's

photograph. (T.R. 16, 17) The officers did not return the Petitioner's identification to him. At no time during this examination and interrogation by these police officers was the Petitioner ever advised that he was free to go, or that he was not compelled to speak to these officers or consent to a search of his personal effects. (T.R. 94)

In fact, Officer Eldridge clearly and unequivocally testified that he wanted the Petitioner to believe that he had to cooperate. (T.R. 95) Eldridge further testified that if the Petitioner would have attempted to leave at the point of the officers' initial contact with him and prior to any controlled substances being discovered, that he would have pursued him and given chase. (T.R. 98, 105-106) (Emphasis added)

Also, during this time, the Petitioner, Eddie Louis Taylor, testified that the officers, while interrogating him, "crowded" him and moved him six to eight feet from the edge of the curb up against the wall of the airport terminal. (T.R. 366-367) The officers clearly and graphically corroborated this portion of the Petitioner's testimony in their hand drawn pictorial diagrams found in Exhibits 4 and 5 to their testimony. (See Exhibits lodged with Clerk)

Officer Bevel next grabbed Taylor's bag by the strap, while it was still hanging from Taylor's shoulder. She then alleged that she requested permission to look inside. The Petitioner did not orally respond. The Petitioner placed the bag on the ground, unzipped it, shuffled papers around in it, and said, "There is

nothing in there that you're looking for." At this point, the officers admit that they did not see or observe any suspicious item in the bag. (T.R. 99) Officer Bevel then bent down to where the bag was and began searching it without the consent of the Petitioner. (T.R. 361, 362, 394-396) At no time to this point in the encounter did the officers ever advise the Petitioner that he was free to leave, or that he did not have to answer their interrogation, or be detained by them. (T.R. 365) The Petitioner also testified that he at no time felt or believed that he was free to leave due to the fact that the officers had him "crowded" and pinned against a wall, were barraging him with incriminating questions, and had displayed their firearms. Officer Bevel, during her search of the bag, found two packages

wrapped in paper and packing tape. (T.R. 363-364)

At this point, the officers continued to interrogate the Petitioner about what was in these unopened packages. The Petitioner was subsequently taken to the security office maintained by the Memphis Police Department Drug Task Force at Memphis International Airport. (T.R. 118, 371-372)

In the security office, the three police officers tried to coerce the Petitioner into signing a written statement and into executing a written Consent to Search Form, each of which request was refused by the Petitioner. The Petitioner requested several times an opportunity to call a lawyer, but was refused by the officers. (T.R. 374-376, 398) Even though the Petitioner herein

refused to sign a written consent form, and no search warrant was ever requested, authorized and/or procured, the officers proceeded to cut into a portion of the wrapped packages, and removed their contents to perform a drug field test. (T.R. 192)

The substance in the packages was field tested for controlled substances, and it tested positive for cocaine. (T.R. 30)

The Petitioner was thereafter advised that he was under arrest and subsequently charged with Violation of Title 18, United States Code, Section 841, et seq.

I. ARGUMENT

I.A.1. The black race constitutes a "suspect" class. Any government action singling out a person on the basis of race or "suspect" class must be given the strictest scrutiny. Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507, 109, S.Ct. 706, 102 L.Ed.2d 854 (1989).

Further, "discriminatory enforcement of the law by the government has traditionally been condemned." Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); Korematsu, supra. Not only did the en banc panel fail to condemn the officers' actions or give their conduct "strict scrutiny" based upon the objective facts before them, they declined to even address the issue in any proper

legal context, despite the clear and unequivocal admissions of the officers that they had been disproportionately targeting blacks or African Americans for allegedly consensual interviews and/or stops at the airport.

In the case at bar, the trial court record strongly demonstrates that law enforcement personnel with the City of Memphis Police Department are discriminately enforcing narcotics laws against blacks or African Americans and other minorities in the Memphis International Airport.

Officer Bonnie Bevel, one of the three white police officers who stopped and detained the Petitioner, testified that 75% of those persons targeted for an investigatory stop, or so-called "consensual interview," by her task force

are black citizens. (Transcript of Motion to Suppress at 211; Joint Appendix at 117)

Officer Britt Roberts testified that, of his last 10 stops and arrests, 6 were black, 2 were Cuban, and the other 2 were Italian. (T.R. at 302) Officer Roberts went on to testify that the airport task force stops "many, many more blacks" than caucasians. (T.R. at 302-3) Officer Roberts also testified that the Petitioner was the only black man to deplane and that Petitioner's "color" was clearly a determinative factor in deciding whether or not to stop and interrogate him.

> "Again, I say his overall appearance, the fact he was certainly different in appearance, whether you go from color or clothes to tennis shoes, whatever, you take all these factors together."
>
> T.R. at 300.

Further, it has been clearly demonstrated that only 5% of all air travelers in 1988,

in the geographic area which includes Memphis, Shelby County, Tennessee, were black.[1]

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[1] A written request by the 6th Circuit instructed your Petitioner to locate and present statistics showing the racial makeup of air travelers at Memphis International Airport. The Petitioner researched but could not locate separate data for the Memphis International Airport; however, Petitioner did locate a 1989 Air Transport Association Survey conducted by the Gallup Organization that encompassed the geographical region in which Memphis, Shelby County, Tennessee, is located, and, further, the survey data was compiled during the time in which Petitioner was arrested, i.e. October, 1988. Your Petitioner then properly filed a Request for the Appeals Court to take Judicial Notice Pursuant to Federal Rule of Evidence 201, same which was granted by the Court, and because Petitioner was permitted to argue the statistical data before the en banc panel. (See Advisory Committee Notes to Rule 201(f) which allows appellate courts to take judicial

Despite these clear, concise, and unrebutted objective facts contained in the record, the majority of the en banc panel determined that there were no facts in the record that would support "a finding that the conduct of the officers in this case gave rise to due process and equal protection considerations."

> A review of the suppression hearing transcript, the briefs and arguments of counsel before the trial court and initially before this court, disclosed no charge that the appellant herein had been selected for a consensual interview because he was an African-American, that the law enforcement officers at the Memphis Airport implemented a general practice or pattern that primarily targeted minorities for consensual interviews, or that they had incorporated a racial component into the drug courier profile. A factually supported record of such charged official conduct in the instant case would have given rise to due process and equal protection constitutional implications cognizable by this court.

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notice.)

Taylor, at 578-9. (Underline emphasis added)

Clearly, based upon the foregoing facts, the majority of the en banc panel has erred in finding the record insufficient to invoke the protections of the 5th and 14th Amendments.

> "The disproportionate number of African-Americans who are stopped indicates that a racial imbalance against African-Americans does exist and is implicitly sanctioned by the law enforcement agency. The assumption that seventy-five percent of those persons transporting drugs and other contraband through public modes of transportation are African-American is impermissible. It flies in the face of reason and legitimates a negative stereotype of African-Americans. Surely, this practice must be subjected to the strictest scrutiny and [can be] justified only by the weightiest of considerations.' Rogers v. Lodge, 458 U.S. 613, 619, 102 S.Ct. 3272, 3276, 73 L.Ed.2d 1012 (1981). If our 'right of locomotion', 'right to be let alone,' or simply our right to be free from capricious and arbitrary government interference in public places is to mean anything, then this race-based practice must stop. See

generally, The Decline of the Right to Locomotion, 75 Cornell L.Rev. at 1260-64.

> We cannot allow law enforcement officers to cloak what may fairly be characterized as a racist practice in a generic drug courier profile that openly targets African-Americans. The actions of these officers were particularly egregious."

United States v. Taylor, at 581-2 (dissenting opinion of Judge Keith). See also United States v. Ceballos, 654 F.2d 177, 185-6 (2d. Cir. 1981).

I.A.2. The majority further compounded their error by holding that due process and equal protection can be vitiated by a citizen subsequently consenting to consensual interview.

> In summary, this court concludes that because the district court -- in factual findings anchored in credibility assessments--expressly determined that the initial curbside encounter between Taylor and the officers was consensual, and because the district court also expressly concluded that the initial search of Taylor's bag was equally consensual and uncoerced, it is unnecessary to consider or decide either the

> specific factual question of whether the officers' surveillance of Taylor was motivated to any degree by his race, or the broader constitutional issue of whether the alleged incorporation of a racial component into the DEA's drug courier profile would, if true, violate an individual's rights to due process and equal protection of the laws.
>
> [Emphasis added]
>
> United States v. Taylor, at 578.

The majority of the en banc panel provides no case law or authority for their inescapable holding that subsequent consent can vitiate or waive 5th and 14th Amendment due process and equal protection rights.

To the contrary, the Sixth Circuit completely ignored its own precedents.

United States v. Kelly, 913 F.2d 261, 265 (6th Cir. 1990), was a case where the voluntariness of a defendant's consent was at issue, and the Sixth Circuit held that, even if the government proves that consent

was given freely, voluntarily, and uncontaminated by any duress or coercion, unlawful conduct by law enforcement officers vitiates any consent where the unlawful conduct precedes any consent. This view is shared by other circuits. United States v. Miller, 821 F.2d 546 (11th Cir. 1987); United States v. Ballard, 573 F.2d 913 (5th Cir. 1978).

Your Petitioner submits and avers that the Sixth Circuit has erred and that the protections and strict scrutiny review standards applied to the 5th and 14th Amendments of due process and equal protection under the law clearly override any "consensual" 4th Amendment issues, and cannot be vitiated by subsequent consent.

The majority opinion poses a most frightening question: If the 4th, 5th, and 14th Amendment rights can be vitiated

by subsequent consent, despite the unlawful conduct of law enforcement, which constitutional rights are going to be the next to fall by the wayside despite law enforcement's unlawful acts?

II. In Florida v. Bostick, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991), this Honorable Court held that under the "right to inquire rule" or "consensual interview" rule, a police officer may approach an individual and ask general questions of that individual "so long as a reasonable person would feel free to disregard the police and go about his business," and "as long as police do not convey a message that compliance with their requests is required." Bostick, at 2386.

The Sixth Circuit firmly established this rule in United States v. Flowers, 909 F.2d 145 (6th Cir. 1990). The en banc

court in the instant case, however, failed to take into consideration the objective facts before it that showed the district court's findings of a "consensual interview" was clearly erroneous.[2]

The officers' own testimony about their attitudes, interrogation, and physical positioning during the initial encounter on the curb with the Petitioner clearly belie the characterization of the stop as a consensual interview, and

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[2] "Clearly erroneous" was the standard of review applied by the en banc panel. Anderson v. City of Bessemer, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985), was cited as authority for this standard of review. Your Petitioner, however, as shown, infra, submits that the standard of review is de novo upon the entire record. In either case, your Petitioner avers an incorrect holding was handed down by the majority of the en banc court.

further belie the voluntariness of the interview as required by Schnecklothe v. Bustamonte, 412 U.S. 218, 227 (1973).

Sergeant Joseph Eldridge was the first to encounter the Petitioner as the Petitioner was about to step off the curb to cross the street. Sergeant Eldridge grabbed and/or physically moved the Petitioner off of the curb and back on to the sidewalk some 6 to 8 feet, up against the airport wall, where he was quickly joined by Officer Bonnie Bevel who intentionally flanked the Defendant opposite from Eldridge. (T.R. at 8, 44, 58, 138, 322, 346, 381, 382) Eldridge then pulled his badge and exposed his pistol so that Petitioner could view it. (T.R. 16, 349, 350, 354) The movement of the Petitioner off the curb, onto the sidewalk, and up against the wall and the

flanking and/or surrounding of the Petitioner was graphically corroborated by the officers' own hand drawn exhibits to their testimony. (See lodged Exhibits)

A third officer, Britt Roberts, in the meantime had intentionally positioned himself across the street between the Petitioner and the parking lot to which the Petitioner was headed, thereby encircling the Petitioner and assuring that he could not under any circumstances leave the area and/or get away from officers of the Airport Drug Task Force.

The Petitioner, flanked by 2 officers and with his back to the wall, was then interrogated by the officers with a litany of questions.

"Where are you coming from?"

"What is in the bag?"

"Do you know anybody in Memphis?"

"Are you meeting anybody in Memphis?"

"Where are you going?"

"Do you have a contact in Memphis?" During this interrogation the officers took his driver's license and kept possession of it. (T.R. 239-244, 355, 358, 359)

It is uncontroverted in that at no point was the Petitioner informed he was free to walk away. Sergeant Eldridge further clearly testified and admitted that he intentionally acted in such a manner so as to make the Petitioner believe that he had to remain and cooperate and that, prior to Officer Bevel's discovering any suspect object or contraband in the tote bag, that if the Petitioner had attempted to leave, he would have chased and pursued him until Petitioner Taylor was stopped and

detained. (T.R. 95, 98, 105) The revealing testimony of Sergeant Eldridge that he would have chased Petitioner Taylor down went as follows:

> Q. Okay. You would have just given pursuit but you wouldn't have tackled?
>
> A. Oh, yeah. I would have kept after him. ...
>
> Q. Would you have just given pursuit?
>
> A. Given pursuit.
>
> Q. What would you have done if you caught up with him and patted him on the back and said that was a fun run like this one through the airport, is that what you are telling this judge under oath in a Federal District Court?
>
> Q. You knew right then as you said that, if he tried to move, if he tried to run, at that point that you were going to stop him, you were going to give pursuit?
>
> A. No, sir. I said I would probably give pursuit. I didn't say that I would stop -- I would probably give pursuit.

Q. Why would you give pursuit if you weren't going to stop, so you could run along and get your exercise?

A. No, sir, I would follow him to where he was going.

Q. Follow him to where he was going?

A. You, sir, I got into -- he tried to get into a car, possibly get in my car. If he took off, I would try to get some kind of communication and have somebody pull in behind him for some more surveillance.

Q. You would try to get him stopped?

A. Definitely. Somebody at this point, they are definitely involved in something if they take off running.

Q. They are definitely involved in something.

A. Yeah.

Q. No question one way or another, you wanted to go in that bag and search him right then and there, you knew that, didn't you?

A. Yes, sir. ...

Under the Bostick rationale and under the totality of the circumstances, no reasonable person, when flanked in such a confining manner by three drug task force officers who had moved him back from the curb some 6 to 8 feet so his back was to the wall and bombarded him with a litany of incriminating questions, would feel free to disregard the police and go about his business.

Further, it also is clear from the foregoing irrefutable facts that the officers intentionally conveyed to the Petitioner that compliance with their requests was mandatory and required. Clearly, this was not a "consensual interview" situation as described in Bostick, supra, and Flowers, supra, and the majority of the Sixth Circuit erred in

not finding the District Court's ruling clearly erroneous.

It is these same set of facts that also conclusively demonstrate that the Petitioner was "seized" for Fourth Amendment purposes on the sidewalk prior to the finding of the two wrapped bundles.

In United States v. Mendenhall, 466 U.S. 544, 552 (1980), this Honorable Court first clearly enunciated the test for determining when a seizure has occurred, and the Sixth Circuit Court of Appeals adopted this test in United States v. Saperstein, 723 F.2d 1221 (6th Cir. 1983). That legal test, and the corresponding conclusion of law upon which the court must arrive, is whether, under the totality of the circumstances, a reasonable person would have believed he or she was free to walk away when

approached and questioned by law enforcement officers. Id.; United States v. Grant, 920 F.2d 376, 382 (6th Cir. 1990).

Also, a seizure can occur if law enforcement acts or positions itself in such a way so as to impede the progress of an individual, to exert physical force against an individual, or to make a show of authority against an individual, or to exert themselves in such a way so as to restrain the individual's liberty without actually touching him. California v. Hodari D., ___ U.S. ___, 111 S.Ct. 1547, 1551-2, 113 L.Ed.2d 590 (1991).

Further, it has been the longstanding law of this Court that conclusions of law such as this one at issue are clearly reviewable de novo upon the entire record so as to maintain uniformity of decision.

Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); United States v. McConney, 728 F.2d 1195 (9th Cir. 1984), cert. denied, 469 U.S. 824, 83 L.Ed.2d 46, 105 S.Ct. 101 (1985). This is especially true where constitutional questions, as the one at bar, are involved. Id.

This Honorable Court, in McConney, in deciding whether there were exigent circumstances present to legalize a warrantless search stated:

> The predominance of factors favoring de novo review is even more striking when the mixed question implicates constitutional rights. In cases involving such questions, the application of law to fact will usually require that the court look to the well defined body of law concerning the relevant constitutional provision. Thus, the Supreme Court has held that the mixed question of law and reviewed de novo. See e.g. Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). This holding implicitly recognizes that the inquiry involved

> in applying the probable cause standard goes well beyond the facts of the case and requires consideration of the abstract legal principles that inform constitutional jurisprudence. A similar recognition, though it may be unarticulated, seems to underlie cases in which our court has reviewed as questions of law such mixed questions as to the reasonableness of certain restrictions on first amendment rights. Ellwest Stereo Theatres, Inc. v. Wenner, 681 F.2d 1243 (9th Cir. 1982); whether there was a "search" in an INS sweep of a factory, International Ladies' Garment Workers' Union v. Sureck, 621 F.2d 624 (9th Cir. 1982), cert. granted sub nom. Immigration and Naturalization Service v. Delgado, ___ U.S. ___, 103 S.Ct. 1872, 76 L.Ed.2d 805 (1983); and whether a post-deprivation hearing within forty-eight hours following the seizure of property conformed to fourteenth amendment due process requirements, Goichman v. Rheuban Motors, Inc., 682 F.2d 1320 (9th Cir. 1982) (Emphasis added)

In Ker and in McConney, the predominant issue was, as in the case at bar, the legality of a warrantless search and seizure, and in each case the appellate courts properly and permissibly

reviewed the case de novo upon the entire record and totality of the circumstances to determine if all the application of the law to the facts made by the trial court were correct, and that the "searching" and "seizing" law enforcement agency did so search and seize within the bounds of the protections of the Fourth Amendment.

In the case at bar, the trial court, in its written Order Denying Motion to Suppress Evidence (Record Entry No. 20), simply concluded, despite the overwhelming evidence and testimony to the contrary, and without citing any supporting basis in fact or evidence, that Mr. Taylor, the Petitioner, "was actually arrested when the cocaine was discovered in the tote bag. At that point he was not free to leave the presence of the officers." From the District Court's vague statement, it

is impossible to know if the court meant the arrest took place outside the airport terminal when officers found two tightly wrapped packages, or later, in the airport security office (when the officers cut into the packages and field tested the substance contained therein).

Your Petitioner strenuously asserts and maintains that this cursory conclusion of law by the trial court is wholly unsupported by the uncontradicted, admitted facts and testimony in this cause that were known to the officers prior to the unlawful search of the Petitioner's tote bag and, further, that the encounter between the officers and the Petitioner was never a Terry stop, but, based upon the testimony of Sergeant Joe Eldridge, was an intentional arrest and constitutionally impermissible seizure

from the moment of the initial approach by law enforcement officers. Terry v. Ohio, 392 U.S. 1 (1968).

Under the totality of the circumstances, no reasonable person, when questioned, flanked in a confining manner by three drug task force officers who had kept his identification, was forced to move by them back up against a wall, and bombarded with a litany of incriminatory questions, would believe he or she was free to walk away, especially where these officers have testified that they had no intentions whatsoever of allowing the Petitioner to leave. Therefore, constitutionally, the "seizure" of the Petitioner, Eddie Louis Taylor, conclusively occurred immediately as the encounter with the officers began on the sidewalk outside the Memphis International

Airport terminal and, contrary to the trial judge's unsupported conclusion of law, this impermissible "seizure" and substantive arrest clearly occurred prior to the discovery of any suspect object and/or controlled substances by the three officers.

The next issue which must be addressed is whether this seizure was legally permissible.

Pursuant to the well reasoned holding of United States v. Cortez, 449 U.S. 411 (1981), the seizure of the Petitioner was legally impermissible as it violated the Petitioner's constitutional right to be free from unlawful searches and seizures.

In Cortez, this Honorable Court enunciated a two-prong test to determine the legality of the seizure of a defendant who allegedly fits the prophylactic "drug

courier profile," which the officers testified was the reason why they followed and confronted the Petitioner.

Prong one provides for trained law enforcement officials to use objective observations to draw reasonable inferences in light of their special experience and expertise. Id, at 418.

The uncontradicted objective information available to these patently untrained officers in the case at bar was that the Petitioner was a black male travelling alone to the nearest major airport to his home in Caruthersville, Missouri, was travelling from Miami, had photo identification and a plane ticket in his true name, walked quickly through the airport, looked over his shoulder, was dressed in clean work clothes, and, in the officers' opinion, acted nervous. The

officers had no tip from a confidential informant that the Petitioner or someone else on the flight was transporting a controlled substance. (T.R. 9) No police drug sniffing dog had tipped off the Petitioner's luggage.

Further, Sergeant Eldridge, the leader of the team that stopped and searched the Petitioner, had worked for the drug task force for only six months and clearly admitted that he had no special expertise or training in the identification of potential drug couriers and clearly stated that he did not even know what a "drug courier profile" was. (T.R. 7, 8, 34, 40) This obvious and fully admitted lack of training and knowledge decreases further the Cortez requirements of the import of expertise in the law enforcement officers' evaluation

and gathering of the objective information.

The second prong of Cortez states that these objective observations, in light of all the circumstances, including the training of the officers in drug interdiction, must raise an articulable suspicion that the particular individual being stopped is engaged in wrongdoing. Id.

The fact that a person is "...travelling from a source city or is nervous ha[s] been characterized as inherently unsuspicious." United States v. Saperstein, 723 F.2d 1221, 1228 (6th Cir. 1983). Additionally, the fact that a person does not stop for luggage and walks briskly through an airport is behavior innocent travellers engage in, and that

fact was readily admitted by Sergeant Eldridge and the other officers.

Further, this Honorable Court held in Reid v. Georgia, 448 U.S. 438 (1980), that the short duration of a trip is behavior consistent with innocent business commuters.

Additionally, this Honorable Court in Reid noted that the purpose of purchasing an airline ticket for cash was so that a purported drug courier could retain anonymity. However, in the case at bar, the Petitioner clearly and admittedly purchased the ticket in his own true name, and had personal identification to prove it.

The articulable factors in the case at bar outlined above would not even lead an agent trained in drug courier detection to any reasonable suspicion that the

Petitioner, Eddie Louis Taylor, was engaged in some sort of criminal activity, much less lead Officer Eldridge, who did not even know what a "drug courier profile" was, to such a suspicion.

Therefore, your Petitioner asserts that he did not match any facet of the prophylactic drug courier profile, and further submits that the totality of the circumstances as known to these patently untrained officers did not and could not yield a particularized suspicion which warranted a constitutional seizure of the person of the Petitioner based on a reasonable and articulable suspicion of criminal activity. The existent combination of objective factors observed by these officers could not even substantiate in them a "hunch" that the Petitioner was engaged in an illegal

activity, and, therefore, constitutes an unlawful search and seizure.

III. The trial court came to the unsubstantiated and explained conclusion of law that valid consent had been given by Mr. Taylor to the officers to allow them to search his tote bag. As shown, supra, in this Brief, such conclusions of law are clearly reviewable de novo upon the entire record by this Honorable Court. Ker v. California, supra; United States v. McConney, supra.

Even if this Honorable Court determines that the seizure of the person of Petitioner Taylor was permissible, your Petitioner asserts he never gave verbal, written, and/or any consent whatsoever for the officers to take his tote bag from his possession and control and/or search said

tote bag, and, therefore, a search warrant was legally essential to search.

Whether actual and legal consent to search was given as a matter of law rests upon an analysis of the totality of the circumstances surrounding the alleged consent. Schneckloth v. Bustamonte, supra at 227.

This Court has clearly held that "[c]onsent must be proved by clear and positive testimony and must be unequivocal, specific, and intelligently given, uncontaminated by any duress or coercion." The prosecution has the burden of proving that consent was given freely and voluntarily. United States v. Kelly, supra at 265; United States v. Cooke, 915 F.2d 250, 252 (6th Cir. 1990); United States v. Williams, 754 F.2d 672, 674-5 (6th Cir. 1985). (Emphasis added)

In United States v. Mendenhall, supra, this Honorable Court held that "[a]lthough the Constitution does not require proof of knowledge of a right to refuse as the sine qua non of an effective consent to a search, ...such knowledge was highly relevant to the determination that there had been consent." Id. at 558-559. (Emphasis added)

The burden on the government to prove voluntary consent becomes much heavier following a constitutionally impermissible seizure.

"In addition to proving valid and voluntary consent to search, the government must also establish the existence of intervening factors which prove that the consent was sufficiently attenuated from the illegal stop." United

States v. Melendez-Gonzales, 727 F.2d 407, 414 (5th Cir. 1984). (Emphasis added)

Further, the law is quite clear that consent given after unlawful treatment is generally not valid. Kelly, supra at 265. (Emphasis added)

Additionally, unlawful conduct by law enforcement officials vitiates any consent where the unlawful conduct precedes any consent. Kelly, citing United States v. Miller, supra at 546; United States v. Thompson, 712 F.2d 1356 (11th Cir. 1983); United States v. Ballard, supra at 913.

Further, alleged consent obtained under duress, especially after an illegal arrest, "does not vitiate the illegality of the arrest." United States v. Jefferson, 650 F.2d 854, 858 (6th Cir. 1981).

The trial court, in its written Order Denying Motion to Suppress Evidence, stated that the Petitioner "consented to the search of his tote bag." However, the Order does not address the pivotal question concerning when or where such consent was given, nor did it address whether the consent was a result of coercion or duress on the part of the officers. Your Petitioner avers and states that the facts found in the trial court's Findings of Fact, and in the transcript of this cause, do not show any type of a valid consent pursuant to the case law and the law of the land.

When Officer Eldridge had chased the Petitioner down, grabbed his arm and/or forced him back against the airport wall, interrogated him, and asked to look in his tote bag, the Petitioner said nothing, but

he did put the bag down, unzipped it himself, juggled papers around, and said, "See, there's nothing in there." At that point the Petitioner stood up and Officer Bevel, who had come upon the scene when Officer Eldridge allegedly asked to search, and without saying a word to the Petitioner, began aggressively searching the tote bag, jerking all the contents of the bag out and throwing them onto the ground. (T.R. 361, 362, 394-396) Further, none of the officers could remember what the Petitioner said to make them believe they had his valid consent to search his bag. One officer heard, "Naw, go ahead," the other heard, "Okay." (T.R. 104, 243) Even if it is believed that Taylor answered, in some manner, affirmatively when asked about searching his tote bag, such alleged consent was

clearly a direct result of the duress and coercion of the three police officers intentionally making the Petitioner feel he was not free to leave -- in fact, was not free to leave and was already under arrest. This is evidenced by the officer's statement that they would have pursued him and chased him down prior to finding any suspicious objects and/or contraband, and their positioning themselves all around the Petitioner clearly intending to confirm and encircle him. At no point was the Petitioner advised that he was free to go and was not legally required to speak and cooperate with these arresting and threatening police officers. (T.R. 365)

Clearly, as the case law mandates, the Petitioner did not, and the government did not prove by clear and positive

evidence, that the Petitioner voluntarily consent to the resulting search at any time pertinent herein, or that the consent was "unequivocal, specific, and intelligently given, uncontaminated by any duress or coercion." Kelly, at 265; Cooke, at 252. The Petitioner was not told he did not have to allow the search, nor did the government prove any intervening factors between the illegal arrest and seizure of the Petitioner, and the alleged consent.[3]

The continuing search of the tote bag in the Drug Task Force Office located at the airport was also clearly without the consent of the Petitioner. There was repeated testimony and evidence that the

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[3] This is not to argue that consent was ever verbalized. It is your Appellant's position that no consent of any kind whatsoever was ever given.

Petitioner was requested by the officers to sign a written Consent To Search Form, but that the Petitioner steadfastly refused. (T.R. at 172, 374-6, 398) No executed written Consent To Search Form was ever offered into evidence by the government, although the officers readily admitted that such written forms were clearly available at the airport office. Therefore, absent exigent circumstances, a warrant was legally necessary to lawfully search the Petitioner's tote bag and process samples for testing. United States v. Grant, at 389. A search warrant was never applied for and/or procured prior to, or even after, the opening of the tote bag, even though there was ample opportunity to do so due to the Petitioner's arrest and, therefore, the warrantless search must be presumed to be

impermissible. Katz v. United States, 389 U.S. 347, 357 (1967). This total failure and/or refusal to comply with the expressed constitutional warrant requirement absolutely exemplifies the very conduct that the exclusionary rule was promulgated to deter; therefore, the evidence against the Petitioner should have been suppressed. United States v. Owens, 782 F.2d 146, 152 (10th Cir. 1986); United States v. Grant, at 389.

Your Petitioner submits that the totality of the circumstances surrounding the alleged consent in the case at bar in no way clearly and unequivocally demonstrates and proves that the Petitioner intelligently gave any consent to any search of his tote bag and, therefore, the subsequent warrantless search must be determined to have

absolutely violated the Petitioner's constitutional right to be free from unlawful searches and seizures by these three police officers.

The Petitioner's very actions demonstrate that any consent he was alleged to have given was specifically limited to his own opening of the bag, revealing only the paper contents at the top of the bag, and then standing up. All actions thereafter taken by the police officers clearly exceeded the scope of what could be considered a permissible search. Walter v. United States, 447 U.S. 549, 656-7 (1980).

J. CONCLUSION

Predicated upon all of the abovesetout, your Petitioner, Eddie Louis Taylor, hereby respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari and allow him to file briefs and orally argue this matter.

Respectfully submitted,

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